

Orix Credit Malaysia Sdn Bhd v M/S Belquip Sdn Bhd & Ors

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HIGH COURT (KUCHING) — SUIT NO 22–18 OF 2001–III (II)
DAVID WONG JC
26 FEBRUARY 2007

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*Hire Purchase — Hire purchase agreement — Guarantee — Default in payments —
Whether guarantor liable under guarantee*

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The plaintiff extended a hire purchase facility ('facility') to the first defendant. As part of the security for the facility, the fifth defendant executed a guarantee agreement in which he promised to pay whatever was owed by the first defendant under the facility. The first defendant defaulted under the facility and as a result, judgment in default was entered and the same had not been set aside by the first defendant. Judgment in default was also entered against the fifth defendant, which was subsequently set aside. The fifth defendant at the material time was both a director and shareholder of the first defendant. The fifth defendant denied his liability, inter alia, on grounds that the plaintiff was in fact involved in money lending without the appropriate license and also certain terms of the hire purchase agreement were immoral and against public policy and hence should be struck out.

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Held, allowing plaintiff's claims:

- (1) Clauses 27 and 7.03 of the hire purchase agreement and guarantee agreement, respectively were sufficiently clear. A clause of this nature has been described as a conclusive evidence clause. Such a clause has been held to be binding and valid by courts in Australia and England (see para 12); *Dobbs v National Bank of Australia* [1953] 53 CLR 643 referred.
- (2) There was no requirement on the part of the plaintiff to adduce evidence to prove quantum and the correctness of the amount claimed if the judgment in default against the first defendant was produced. The plaintiff not only produced the judgment against the first defendant, but also adduced ample evidence to show how the amount claimed was calculated. The judgment in default against the first defendant had not been seriously challenged by the fifth defendant except to say that the hire purchase agreement was in fact a loan transaction. Until such time that the judgment in default against the first defendant is set aside, the fifth defendant had not discharged the burden of disproving the amount claimed (see para 13).
- (3) The fact that there was no payment of cash deposit did not affect the liability of the fifth defendant. As far as the plaintiff was concerned, they provided hire purchase financing to the first defendant. There was no evidence to show that

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- A** the plaintiff, the first defendant and the supplier of the equipment for the facility were involved in one big conspiracy of fraud or some other illegal acts (see para 15).
- B** (4) The letter of demand to the fifth defendant had not been seriously challenged by the fifth defendant. The letter of demand was sent to the address set out in the guarantee agreement and when there was no notice of change of address to the plaintiff, the fifth defendant cannot complain that he had not received it. The presumption was that he had received it unless proven otherwise, which the fifth defendant had failed to do (see para 16).
- C** (5) The sum claimed did not include interest on interest. It was interest charged on overdue monthly installment which is provided for in the hire purchase agreement. In any event compound interest is allowable when the parties had agreed to it (see para 17). *Terengganu State Economic Development Corp v Nadefinco Ltd* [1982] 1 MLJ 365 referred.

D [Bahasa Malaysia summary]

- Plaintif memberikan kemudahan sewa beli ('kemudahan') kepada defendan pertama. Sebahagian daripada jaminan kepada kemudahan, defendan kelima melaksanakan perjanjian jaminan yang mana beliau berjanji untuk membayar apa sahaja yang terhutang oleh defendan pertama di bawah kemudahan tersebut. Defendan pertama telah mungkir di bawah kemudahan tersebut dan menyebabkan penghakiman ingkar telah dimasukkan dan ianya tidak diketepikan oleh defendan pertama. Penghakiman ingkar juga telah dimasukkan terhadap defendan kelima yang mana kemudiannya diketepikan. Defendan kelima pada segala masa yang material adalah pengarah dan juga pemegang saham defendan pertama. Defendan kelima menafikan liabilitinya, antara lain, atas alasan bahawa plaintif terlibat dalam memberi pinjaman wang tanpa lesen yang sesuai dan sebahagian terma-terma perjanjian sewa beli adalah tidak bermoral dan bertentangan dengan polisi awam dan seharusnya dibatalkan.
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G **Diputuskan**, membenarkan tuntutan plaintif:

- (1) Klausula 27 dan 7.03 perjanjian sewa beli dan perjanjian jaminan, masing-masing adalah cukup jelas. Satu-satu klausa dalam keadaan adalah disifatkan sebagai satu klausa bukti yang kukuh. Klausula tersebut adalah diputuskan sebagai mengikat dan sah oleh mahkamah di dalam Australia and England (lihat perenggan 12); *Dobbs v National Bank of Australia* [1953] 53 CLR 643 dirujuk.
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- (2) Tidak terdapatnya syarat bagi pihak plaintif untuk mengemukakan keterangan untuk membuktikan kuantum dan ketepatan jumlah yang dituntut jika penghakiman ingkar terhadap defendan pertama dikemukakan. Plaintif bukan sahaja mengemukakan penghakiman terhadap defendan pertama, tetapi mengemukakan juga keterangan yang lebih dari mencukupi untuk menunjukkan jumlah yang dituntut dikira. Penghakiman ingkar terhadap defendan pertama tidak dicabar secara serius oleh defendan kelima kecuali menyatakan bahawa perjanjian sewa beli adalah transaksi pinjaman.
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Sehingga ketika penghakiman ingkar terhadap defendan pertama diketepikan, defendan kelima tidak melepaskan beban pembuktian jumlah yang dituntut adalah salah (lihat perenggan 13).

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- (3) Keadaan di mana tidak terdapatnya pembayaran deposit tunai tidak memberikan kesan ke atas liabiliti defendan kelima. Sejauh mana plaintif ambil tahu adalah mereka menyediakan pembiayaan sewa beli kepada defendan pertama. Tidak terdapatnya bukti yang menunjukkan bahawa plaintif, defendan pertama dan pembekal peralatan untuk kemudahan tersebut terlibat di dalam satu konspirasi penipuan yang besar atau tindakan yang menyalahi undang-undang yang lain (lihat perenggan 15).

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- (4) Surat tuntutan kepada defendan kelima tidak dicabar secara serius oleh defendan kelima. Surat tuntutan telah dihantar ke alamat yang dinyatakan di dalam perjanjian jaminan dan apabila tiada notis pertukaran alamat kepada plaintif, defendan kelima tidak boleh mengatakan bahawa beliau tidak menerimanya. Anggapannya adalah bahawa beliau telah menerimanya sehingga dibuktikan sebaliknya yang mana defendan kelima gagal melakukannya (lihat perenggan 16).

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- (5) Jumlah yang dituntut tidak termasuk faedah di atas faedah. Ianya adalah faedah yang dikenakan ke atas ansuran bulanan yang tertunggak yang mana disediakan di dalam perjanjian sewa beli. Dalam apa jua keadaan, faedah denda adalah dibenarkan apabila pihak-pihak bersetuju ke atasnya (lihat perenggan 17); *Terengganu State Economic Development Corp v Nadeffinco Ltd* [1982] 1 MLJ 365 dirujuk.]

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Notes

For cases on guarantee, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3888–3891.

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Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685 (refd)

Dobbs v National Bank of Australia [1953] 53 CLR 643 (refd)

Terengganu State Economic Development Corp v Nadeffinco Ltd [1982] 1 MLJ 365 (refd)

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Legislation referred to

Civil Law Act 1950 s 11(a)

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Lau Mei Ling (Sim & Yee Advocates) for the plaintiff.

Chan Kay Heng (Chan & Chan Advocates) for the fifth defendant.

David Wong JC:

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PROCEEDING

[1] This proceeding arises from a claim by the plaintiff against the fifth defendant as a guarantor under a guarantee and indemnity dated 6 September 1996 ('guarantee

- A** agreement') in which he guaranteed the liability of the first defendant under a hire purchase agreement also dated 6 September 1996 entered between the first defendant and the plaintiff ('hire purchase agreement'). The fifth defendant denies his liability, inter alia, on the grounds that the plaintiff is in fact involved in money lending without the appropriate license and also certain terms of the hire purchase agreement are immoral and against public policy and hence should be struck down.
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UNDISPUTED FACTS

- C** [2] The plaintiff extended a hire purchase facility to the first defendant for the purchase of a unit of Mitsubishi AD250 Articulated Dumper ('Dumper'). This hire purchase facility is evidenced in exh P3. As part of the security for the aforesaid finance, the fifth defendant executed a guarantee agreement in which he promised to pay whatever was owed by the first defendant under the hire purchase finance facility. This guarantee agreement is evidenced in exh P6. The first defendant defaulted under the hire purchase agreement and as a result, judgment in default had been entered on the 11 April 2001 and the same had not been set aside by the first defendant.
- D** Judgment in default was entered against the fifth defendant and the same was set aside by me on the 20 June 2006. The fifth defendant at the material time was both a director and shareholder of the first defendant.

PLAINTIFF'S CASE

- E** [3] In proving its case the plaintiff used two modes, firstly by direct evidence from PW1 and PW2 and secondly pursuant to cl 2 of the guarantee agreement which reads as follows:

- F** 2. An acknowledgement in writing by the hirer of the hirer's indebtedness under the hire purchase agreement (whether such acknowledgement be express or implied) shall be conclusive evidence of such indebtedness against me/us and any judgment or order obtained against the hirer shall be binding on me/us and I/we shall be precluded from disputing the hirer's liability as determined by the said judgment or order

- G** [4] PW1, who was the operating officer in charge of the plaintiff Kuching branch at the material time gave oral evidence to the effect that the plaintiff had financed the first defendant in the sum of RM1,015,000 for the purchase of a unit of a dumper and the same was to be repaid by 36 installments as set out in the hire purchase agreement. The hire purchase facility was guaranteed by the forth and fifth defendants. Further, she testified that the first defendant had defaulted under the hire purchase agreement resulting in repossession of the dumper which was sold off by tender by the plaintiff for the sum of RM190,000. PW1 also took the court through para 5 of the statement of claim which states as follows:
- H**

I Particulars

	Cash Price	RM	1,350,000
Less	Deposit	RM	335,000

		RM	1,015,000	A
Add	Term Charges	RM	233,867	
		RM	1,248,876	
Less	Installments paid	RM	174,455	
		RM	1,074,421	B
Add	Overdue Interest at 0.065% per day Till 25 October 2000	RM	167,543.93	
	Storage Fee	RM	2,327.95	C
	Freight/Towing	RM	1,059	
	Legal fees	RM	277.50	
	Insurance, advertisement, Sundry Debit & Postage.	RM	1,540.51	
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		RM	1,247,169.89	
Less	Statutory rebate available till 27 March 1998	RM	66,721.38	
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		RM	1,180,448.51	
Less	Sales Proceeds	RM	190,000	
		RM	990,448.51	
Add	Interest at 0.065% per day on shortfall Amount of RM817,699.62 from 26 October 2000 to 8 December 2000 (43 days)	RM	22,854.70	F
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		RM	1,013,303.21	

[5] In the tender process, she also testified that the plaintiff had taken all steps to ensure the best price was obtained and the first defendant and fifth defendant had been informed of the repossession exercise. This part of the testimony is evidenced by the various letters to the first and fifth defendant, the invitation of tender, and the agreement between the successful bidder of the dumper. The relevant exhs are P15 (letter of intended sale by plaintiff to first defendant), P16 (advertisement for tender), P17 (tender form of successful bidder) and P18 (offer of sale to successful bidder).

[6] PW2, who was the senior officer for credit control of the plaintiff, was called to testify on how the figures for term charges, statutory rebate, shortfall amount and chargeable interests were arrived at. In doing so, she produced exh P31 (a) and (b) to show how those figures were arrived at.

- A [7] In respect of the second mode of proof, the judgment against the first defendant (exh P7) was tendered pursuant to cl 2 of the guarantee agreement.

THE DEFENDANTS' CASE

- B [8] The defense called three witnesses. DW1, the fifth defendant, took the stand to testify on his behalf and his testimony is one of 'I don't know' and 'I don't remember'. He also testified that there was no payment of the cash deposit of RM335,000 to the supplier of the dumper. These allegations of course must be viewed together with the other evidences, one of which was the undisputed fact of his admission of having signed the relevant minute of the first defendant to purchase the dumper and the guarantee agreement. There was also no allegation that he did not understand what he was signing. As for DW2, who is the father of DW1 and a sitting Sarawak Senator of the House of the Senate, his testimony tells of one company called Intro Progress Sdn Bhd which acted as an umbrella company and recommended the financier to provide finance for companies under the umbrella company. He testified that the first defendant was one of those companies which he recommended to the plaintiff to provide finance. And as far as he knew the first defendant like the other companies under his umbrella company did not have the money to pay the cash deposit of RM335,000. He of course does not hold any position or shareholding in the first defendant.
- E [9] The fifth defendant also alleged that no notice of demand was issued to him and that the amount claimed included interests on interests, which it is contended is not allowable in law.

F FINDINGS OF THE COURT

- G [10] It is trite law that the burden of proving the claim lies with the plaintiff. If at the end of the plaintiff's case, a prima facie case is established the burden is shifted to the defendant to rebut the plaintiff's case. If of course no prima facie case had been established by the plaintiff, then there is nothing for the defendant to rebut.
- H [11] In discharging this burden, the plaintiff firstly relied on the evidences of PW1 and PW2 who showed the court in details how the claim was arrived at together with supporting documents and also what kind of steps the plaintiff took to dispose of the repossessed dumper. Secondly, it relied on the judgment against the first defendant to prove the amount claimed.
- I [12] I shall first deal with the legal effect of the conclusive clause set out earlier. There is an abundance of cases on this area of law but suffice for this court just to refer to the latest Federal Court decision in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 which held as follows (at pp 691–692):

In the result, the Court of Appeal took the position that the conclusiveness of the certificate of indebtedness exh P3 was binding only upon the parties and that the court would still have to determine whether sufficient evidence had been adduced to prove quantum and the

correctness of the amount claimed. With respect, such a proposition goes against the entrenched principles enunciated by Raja Azlan Shah CJ (Malaya) (as His Highness then was) in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 when he said, inter alia:

We have often said in this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the RSC O 14 procedure. In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents.... It means that, for the purpose of fixing liability of the respondents, the Company's indebtedness may be ascertained conclusively by a certificate.

The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim. (emphasis added).

In the instant case, the relevant cl 27 and 7.03 of the loan agreement and guarantee agreement respectively are sufficiently clear. A clause of this nature has been described as a conclusive evidence clause. Such a clause has been held to be binding and valid by courts in Australia and England. In *Dobbs v National Bank of Australia* [1953] 53 CLR 643, the Australian court made the following observation which we think is instructive:

The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate. But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness.

[13] The above dictum is clear and it is this. There is no requirement on the part of the plaintiff to adduce evidence to prove quantum and the correctness of the amount claimed if the judgment in default against the first defendant is produced. In the present case not only did PW1 produce the judgment against the first defendant, she and PW2 also adduced ample evidence to show how the amount claimed was calculated. The judgment in default against the first defendant had not been seriously challenged by the fifth defendant except to say that the hire purchase agreement was in fact a loan transaction. The fifth defendant has a big hurdle to overcome and it is this. Until such time that the judgment in default against the first defendant is set aside he had not discharged the burden of disproving the amount claimed. It should be noted that the fifth defendant as a director of the first defendant until after this trial had started did not take steps to set aside the judgment against the first defendant. This belated application was in direct response to what was happening in this trial.

[14] In any event the fifth defendant had agreed to the conditions stated in cl 2 of the guarantee agreement and learned counsel for the fifth defendant, Mr Chan Kay

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A Heng ('Mr Chan') has not given me reasons why this court should not give effect to them. Further the detailed and direct evidences of PW1 and PW2 had not been rebutted at all by the fifth defendant.

B [15] In respect of the contention that the hire purchase agreement was in fact a money lending agreement and ought to be struck down as the plaintiff did not possess a moneylending license, Mr Chan based it on the allegation that the cash deposit of RM335,000 stated in the hire purchase agreement was never paid by the first defendant. If I were to concede to Mr Chan's submission I would be ignoring documentary evidences such as exhs P4 (invoice by Alquip Sdn Bhd to plaintiff), P5 (board meeting minutes of the first Defendant dated 6 September 1996 approving the hire purchase agreement) and P6 (guarantee agreement). The witness who needed to be called is someone from the supplier Alquip Sdn Bhd. Only they can confirm whether the allegation is correct. In any event, even if there was no payment of the cash deposit, I do not see how it affects the liability of the fifth defendant. As far as the plaintiff is concerned they were providing hire purchase financing to the first defendant. There is no evidence to show that the plaintiff, first defendant and the supplier were involved in one big conspiracy of fraud or some other illegal acts. In fact had the Bakun Project succeeded, the first defendant would have benefited from the hire purchase agreement and there would not have been any allegation of any improper dealing.

E [16] As for the non receipt of the notice of demand by the fifth defendant, the evidence (exh P14 — the letter of demand to fifth defendant dated 18 December 2000) had not been seriously challenged in court by the fifth defendant. The letter of demand was sent to the address set out in the guarantee agreement and when there is no notice of change of address to the plaintiff, the fifth defendant cannot complain that he had not received it. The presumption is that he had received it unless proven otherwise, which the fifth defendant had failed to do.

G [17] Finally, on the contention that the sum claimed included interests on interests and hence not allowed by s 11(a) of the Civil Law Act 1950, my view is that the sum claimed did not include interests on interests. It was interests charged on overdue monthly installment which is provided for in the hire purchase agreement. In any event compound interest is allowable when the parties had agreed to it and I refer to what was stated by Salleh Abbas FJ (as he then was) sitting as a High Court judge in *Terengganu State Economic Development Corp v Nadeфинco Ltd* [1982] 1 MLJ 365 at pp 368–369, when dealing with that contention, viz:

H The short answer to this submission is that the interest chargeable in this case is not based on the statutory discretion given to the court under s 11 of the Civil Law Act 1950, or under any other Act, but upon the agreement of the parties as evinced in exh P2, P3 and P4. Furthermore the language of s 11 itself leaves no room for doubt that in cases not covered by the section the court is not prohibited from giving interest upon interest. The fact that the court is not authorised does not mean that it is prevented from doing so. What therefore is the principle upon which the plaintiffs could claim the calculation of interest at rests? ...

I ... It is therefore obvious that as a matter of law compound interest could be allowed by the court if there are circumstances showing that the accounting party has made profits and

derived benefits by withholding the money. This principle was reaffirmed by Lord Hatherley LC in *Burdick v Garrick* [1869-70] LR 5 Ch Ap 233 as being a sound principle.

[18] For all the reasons stated above, I enter judgment for the plaintiff on terms as stated in prayers (1) (2) and (3) of the statement of claim (encl 98). As for prayer (3) of the same, it is to be taxed unless agreed.

Plaintiff's claims allowed.

Reported by Peter Ling

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